

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
IJG, INC. &)	
)	
SHELTON CONSTRUCTION CO.,)	
LLC)	
)	
RESPONDENTS)	CASE NO. WPC07-0226

DIRECTOR'S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, Director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed Director of the Tennessee Division of Water Pollution Control (hereinafter the “director” and the “division” respectively) by the Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the “commissioner” and the “department” respectively).

II.

IJG, Inc. (hereinafter “Respondent IJG”) is an owner/developer of the property located off Ooltewah Ringgold Road in Hamilton County, latitude 34.990277N, longitude -85.096944W in East Brainerd, TN (hereinafter “the site”). Service of process

may be made on Ival Goldstein, Registered Agent, at 7506-B East Brainerd Road, Chattanooga, Tennessee 37421.

III.

Shelton Construction Co., LLC (hereinafter “Respondent Shelton Construction”) is a limited liability company licensed to conduct business in Tennessee. Respondent Shelton Construction was contracted by Respondent IJG to perform work at the site. Service of process may be made on Mitchell Shelton, Registered agent, at 7611-A Hixson Pike, Hixson, Tennessee 37343.

JURISDICTION

IV.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) §69-3-101 *et seq.*, the Water Quality Control Act, (hereinafter the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and may order corrective action be taken pursuant to T.C.A. §69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act. Department rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. §69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (hereinafter the “Rule”). Pursuant to T.C.A.

§69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

V.

The Respondents are “persons” as defined at T.C.A. §69-3-103(20) and, as hereinafter stated, have violated the Act.

VI.

Johnson Branch referred to herein, is “waters of the state,” as defined by T.C.A. §69-3-103(33). Pursuant to T.C.A. §69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, “Use Classifications For Surface Waters,” is contained in the *Official Compilation of Rules and Regulations for the State of Tennessee*. Accordingly, Johnson Branch has been classified for the following uses: Fish and Aquatic Life (Not Assessed), Recreation (Not Assessed), Irrigation (Not Assessed), Livestock Watering and Wildlife (Not Assessed). In addition, Johnson Branch (from mouth to headwaters) has been designated as Exceptional Tennessee Waters due to presence of state threatened Chickamauga Crayfish.

VII.

Johnson Branch and its unnamed tributaries referred to herein, are “waters of the state,” as defined by T.C.A. §69-3-103(33). Pursuant to T.C.A. §69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board

for suitable uses. Department Rule 1200-4-4, "Use Classifications For Surface Waters," is contained in the *Official Compilation of Rules and Regulations for the State of Tennessee*. Accordingly, unnamed tributary to Johnson Branch and Johnson Branch have been classified for the following uses: Fish and Aquatic Life (Not Assessed), Recreation (Not Assessed), Irrigation (Not Assessed), Livestock Watering and Wildlife (Not Assessed).

VIII.

T.C.A. §69-3-108 requires a person to obtain coverage under permit prior to discharging any substance to waters of the state, or to a location from which it is likely that the discharged substance will move into waters. Coverage under the General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the "TNCGP") may be obtained by submittal of a Notice of Intent (NOI), Storm Water Pollution Prevention Plan (SWPPP) and the associated fee.

FACTS

IX.

On July 25, 2006, the division received a NOI from Respondent IJG, identifying Respondent Shelton Construction as the contractor at the site. The initial Storm Water Pollution Prevention Plan (SWPPP) submitted by the applicant did not specify the required streamside/wetland buffers for the onsite water resources. Once a series of additional equivalent EPSC measures were proposed and combined with existing buffer

zones that had an average width of less than 60 feet, the Notice of Coverage (NOC) was issued on August 16, 2006.

X.

On February 26, 2007, division personnel from the Chattanooga Environmental Field Office (CH-EFO) investigated a complaint at the site. Division personnel noted that the silt fencing and/or mulch berms were disturbed and in need of repair. Due to the lack of adequate Erosion Prevention and Sediment Control (EPSC) measures, sediment from the construction activities had been discharged into the wetlands adjacent to outfall number four, and from detention pond number one. The resulting Notice of Violation (NOV), dated February 28, 2007, instructed respondents to repair and upgrade all EPSC measures at the site, remove sediment accumulated in the wetlands with hand tools and convert pond number one from a detention pond into a retention pond, in order to accomplish its function as a sediment removal structure.

XI.

On September 14, 2007, division personnel inspected the site. Sediment-laden storm water runoff was observed being discharged from the site. The discharge created an objectionable color-contrast in the receiving streams. EPSC measures at the site were found to be highly inadequate to retain sediment on the site and existing EPSC measures were not properly maintained. The resulting NOV, dated September 19, 2007, instructed the respondents to repair and upgrade all EPSC measures at the site, stabilize areas that are at a final grade, provide documentation that the person conducting inspections has

successfully completed the “Fundamentals of Erosion Prevention and Sediment Control” course, convert pond number one from a detention pond into a retention pond and update and re-submit the SWPPP to the CH-EFO.

VIOLATIONS

XII.

By failing to properly install and maintain erosion prevention and sediment control measures at a land disturbance activity, the activity described herein did cause an increase in unauthorized discharges of wastes into the waters of the state. Therefore, the Respondents have violated T.C.A. §69-3-108(b) and 69-3-114(b), which state:

T.C.A. §69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes, or other wastes into water, or a location from which it is likely that the discharged substances will move into waters;

T.C.A. §69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a

permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XIII.

By failing to comply with terms and conditions of the TNCGP as described herein, the Respondents have violated T.C.A. §§69-3-108(b) and 69-3-114(a)-(b), as stated above.

XIV.

By discharging sediment into waters of the state that resulted in a condition of pollution, the Respondents have violated T.C.A. §69-3-114(a), which state:

T.C.A. §69-3-114(a):

It shall be unlawful for any person to discharge any substance into waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XV.

WHEREFORE, pursuant to the authority vested by T.C.A. §§69-3-107, 69-3-109, 69-3-115, and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER and ASSESSMENT to the Respondents:

1. The Respondents shall implement appropriate professionally designed EPSC measures to ensure that no material leaves the site and enters waters of the state within SEVEN (7) DAYS of receipt of this Order.

2. The Respondents shall, within SEVEN (7) DAYS of establishing effective EPSC measures, submit written documentation and photographic evidence indicating that these measures are in place. The Respondent shall submit this written documentation and photographic evidence to the Water Pollution Control Manager in the CH-EFO located at 540 McCallie Avenue, Suite 550, Chattanooga, Tennessee 37402.
3. The Respondents shall, within FOURTEEN (14) DAYS of receipt of this ORDER, submit a revised and updated SWPPP to the CH-EFO at the address shown in item 3, above.
4. The Respondents shall maintain EPSC measures until such time as all land disturbance activities at the site are complete and erosion-preventive permanent cover is established.
5. The Respondents shall obtain the services of a qualified consultant to evaluate sediment deposition in Johnson Branch and the unnamed tributary upstream and downstream of the site following the Habitat Assessment Guidelines as set forth in the Department's Quality System Standard Operating Procedure for Macroinvertebrate Stream Surveys. The habitat assessment and a plan for the restoration of impacted streams, if necessary, shall be completed within 15-days of receipt of this order. This plan shall, at a minimum, include detailed options for removing the sediment, where appropriate, and a time schedule to identify proposed activities dates required to complete the work. The plan shall be submitted to the CH-EFO at the address shown in item 3, above.

6. The Respondents shall, within 15 days of receipt of approval of the restoration plan, complete all work identified in the approved plan.
7. The Respondents shall, by April 30, 2008, attend a Fundamentals of Erosion Prevention and Sediment Control Workshop provided by the department and submit documentation of successful completion to the manager of the CH-EFO, at the address shown in item 3, above.
8. The Respondents are hereby assessed a CIVIL PENALTY in the amount of THIRTY THOUSAND DOLLARS (\$30,000.00).
 - a. The Respondents shall pay SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500.00) to the division within THIRTY (30) DAYS of receipt of this Order.
 - b. The Respondents shall pay SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$5,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondents fail to comply with Item 1 above in a timely manner.
 - c. The Respondents shall pay TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondents fail to comply with Item 2 above in a timely manner.
 - d. The Respondents shall pay TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondents fail to comply with Item 3 above in a timely manner.

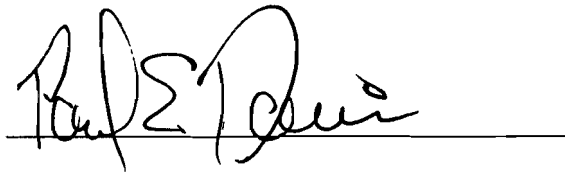
- e. The Respondents shall pay SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$5,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondents fail to comply with Item 4 above in a timely manner.
 - f. The Respondents shall pay TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondents fail to comply with Item 5 above in a timely manner.
 - g. The Respondents shall pay TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondents fail to comply with Item 6 above in a timely manner.
 - h. The Respondents shall pay TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fail to comply with Item 7 above in a timely manner.
9. The Respondents shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director may, for good cause shown, extend the compliance dates contained within this ORDER. In order to be eligible for this time extension, the Respondents shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a

minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the division will be in writing. Should the Respondents fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondents are advised that the foregoing ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Issued by the Director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this 22nd day of OCTOBER, 2007.

A handwritten signature in black ink, appearing to read "Paul E. Davis", is written over a horizontal line.

Paul E. Davis, P.E.
Director, Division of Water Pollution Control

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109, 115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General

Counsel a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this Order and Assessment. The petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L&C Tower, 401 Church Street, Nashville, TN 37243-1548".

If the required written petition is not filed within THIRTY (30) DAYS of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. §4-5-301 *et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondents may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low- income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payments of the civil penalty shall be made payable to the “Treasurer, State of Tennessee,” and sent to the Division of Fiscal Services-Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L&C Tower, 401 Church Street, Nashville, Tennessee 37243. All other correspondence regarding this matter should be sent to Paul E. Davis, Director, Division of Water Pollution and Control, at the address above. Please write your case number on all payments and all correspondence concerning this matter.